



Signed: January 09, 2007

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 06-41635
MARY GSCHWEND, Chapter 13
Debtor./

MEMORANDUM RE: MOTION TO DISMISS

Creditor Barbara G. Markus ("Markus") has moved to dismiss this chapter 13 case. The court heard the matter on January 8, 2007. Debtor Mary Gschwend ("Gschwend") appeared in pro se, and Markus appeared through counsel. The court will grant Markus's motion to dismiss, but will stay the dismissal for a period of 20 days from service of the order of dismissal to provide Gschwend with the opportunity to file a confirmable chapter 13 plan.

On January 2, 2003, Markus obtained a judgment against Gschwend in the California Superior Court, Contra Costa County. Numerous motions and appeals by Gschwend followed, by which she attempted to have the judgment vacated. None of these efforts were successful,

Memorandum

1 and on September 22, 2004, the California Supreme Court denied
2 Gschwend's petition for review.

3 The superior court judgment became final in due course, and
4 Markus attempted to collect. On September 14, 2006, Gschwend filed
5 the chapter 13 petition herein. Markus filed a secured claim in the
6 sum of \$59,316, based on a judgment lien in her favor.

7 Gschwend's proposed chapter 13 plan provides for Gschwend to
8 continue litigating the validity of Markus's claim against her, and
9 during the litigation, to make payments to the chapter 13 trustee of
10 \$100 per month for a period of three years. The plan further
11 provides that Gschwend will refinance some property and pay Markus
12 in the event such litigation is not successful. Finally, the plan
13 provides that Gschwend is to make direct payments to secured
14 claimant Countrywide Home Loans. (Gschwend listed no unsecured
15 claims.)

16 In her motion to dismiss, Markus argues that this is a bad
17 faith filing by Gschwend. Markus argues that Gschwend shows a net
18 worth in her schedules of some \$1.3 million, has no unsecured
19 claimants, has no apparent need for relief in respect of her two
20 other secured claimants, and filed this case solely for purposes of
21 delay. Markus also notes that Gschwend has had some four years to
22 repay her judgment debt to Markus by refinancing property or
23 otherwise. Markus also alleges that Gschwend has concealed assets
24 by failing to list same in her schedules.

25 In her opposition, Gschwend asserted various reasons why she
26 believes Markus's judgment against her is invalid. At oral

1 argument, she insisted that she be given a chance to challenge the
2 superior court judgment through an adversary proceeding in the
3 bankruptcy court.

4 The plan filed by Gschwend is not confirmable. The judgment in
5 favor of Markus is final, and Gschwend may not challenge it or
6 litigate the issues in this court. In re Int'l Nutronics, Inc., 28
7 F.3d 965, 969 (9th Cir. 1994). See also 28 U.S.C. § 1738 (requiring
8 federal courts to give full faith and credit to state court
9 judgments); Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S.
10 373, 380, 105 S.Ct. 1327 (1985).¹

11 Although this case has many of the earmarks of a bad faith
12 filing, the court feels compelled by recent case law to provide
13 Gschwend with an opportunity to amend her plan. See In re Nelson,
14 343 B.R. 671 (9th Cir. B.A.P. 2006). Accordingly, the court will
15 stay dismissal for a period of 20 days following service of the
16 order of dismissal on Gschwend. In the event Gschwend files a plan
17 contemplating re-litigation of her debt to Markus, the dismissal
18 will stand, the court reserving jurisdiction to enter such
19 additional orders, if any, as may be appropriate. If, on the other
20 hand, Gschwend files a plan providing for full payment of all
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24 ¹The foregoing holds true even if a state court judgment is
25 a default judgment. In re Daqhighfekr, 161 B.R. 685 (9th Cir.
26 B.A.P. 1993); In re Nourbakhsh, 67 F.3d 798 (9th Cir. 1995).

1 amounts she owes to Markus within a reasonable time,² the court will
2 revisit dismissal and any other relevant issues.

3 The court will issue its order so providing.

4 ** END OF ORDER **
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25 ²The court would assess what is reasonable with reference to
26 the amount of time it might require a debtor acting in good
faith, with due dispatch, to obtain a refinance loan.

Memorandum

COURT SERVICE LIST

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